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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WANDA CHERRY et al.,

Plaintiffs and Appellants,

v.

3075 WILSHIRE BOULEVARD et al.,

Defendants and Appellants.

B191020

(Los Angeles County
Super. Ct. No. BC246970)

APPEALS from judgments of the Superior Court of Los Angeles County.

Ricardo A. Torres, Judge. Affirmed.

Law Offices of Robert Scott Shtofman, Robert Scott Shtofman; Law Offices of David Kyle, David Kyle; Schlossberg & Krzemuski and Andrew L. Krzemuski for Plaintiffs and Appellants.

Murchison & Cumming and Edmund G. Farrell III for Defendants and Appellants.

* * * * *

Plaintiffs and appellants Wanda Cherry, Joel Geffen, Gloria Cabral, Myrna Concepcion, Wilma Pickett, Cynthia Stokes, Sheryl Richardson, Sharon O'Brien, Josephine Hill, Stephanie Brown, Brenda Wilson, Phyllis Evans, Linda Holzwarth, Kimberly Jones, Georgiana Treder, Faith Coney, Anthony Bazley, Martha Gomez, Kai Parker, Dwayne Polee, Octavia Johnson, Dedrie Brown and Alyce Beard (sometimes collectively appellants) appeal from a judgment entered following a jury trial on their premises liability action brought against defendants and appellants 3075 Wilshire Boulevard, LLC and Jamison Properties, Inc., and defendant and respondents David Young Lee and Hee-Sook Fung (sometimes collectively defendants). Appellants challenge certain evidentiary rulings and the summary denial of an ex parte application, and contend that the trial judge was biased as evidenced by his demeanor during trial and the nondisclosure of a commercial relationship between his adult children and respondents; they further claim that the trial court erred in granting nonsuit as to certain individual parties and claims. Defendants cross-appeal, contending that substantial evidence did not support the damages awarded to Wanda Cherry.

We affirm. While the lack of respect between appellants' counsel and the trial court is evident from the record, we cannot conclude that the sheer number of appellants' complaints alone is adequate to create a reversible issue on appeal. The trial court did not abuse its discretion in excluding certain evidence and in limiting the admission of additional documents. Nor was there sufficient evidence of bias depriving appellants of a fair trial. Finally, the trial court properly granted nonsuit as to several parties and claims, as appellants failed to proffer sufficient evidence to permit such issues to go to the jury. With respect to defendants' appeal, substantial evidence supported the verdict in favor of the lead plaintiff.

FACTUAL AND PROCEDURAL BACKGROUND

The Building's Purchase and Occupancy.

An office building located at 3075 Wilshire Boulevard in Los Angeles (Building) was vacant between 1992 and 1997. David Lee, M.D. (Dr. Lee) formed a limited liability

company, 3075 Wilshire Boulevard, LLC (LLC), to purchase the Building in October 1997. Claire Fung was one of six investors in the LLC and she and Dr. Lee served as its managing members. An operating agreement signed by the LLC gave it the authority to act as the Building's manager. Dr. Lee and Fung supervised the management of the Building and initially paid John Kim both to lease out and manage the Building. Kim was a property manager for Jamison Properties, Inc. (Jamison); he later became a vice-president of Jamison and then senior vice-president.

At the recommendation of engineer Tom Muffy, Dr. Lee and Fung asked Leo Barragan to serve as the Building's sole engineer in December 1997 and later as its manager in 1999. Barragan had no training in building management. In 1997, he spent somewhere between two and 20 hours per week working on the Building. He spent approximately 15 hours per week on the Building in 1999 and 12 hours per week thereafter. In terms of building maintenance, he did not disinfect the Building's hot and cold water tanks at any time prior to October 2000. Nor were the air conditioning vents cleaned prior to occupancy. He cleaned the cooling tower twice between 1997 and 2000.

The County of Los Angeles became the Building's single tenant beginning in March 1998. Building occupants—employees of the Department of Children and Family Services (Department)—were concerned when they saw puddles in corners of the Building and leaks in stairwells, and noticed the Building was extremely cold and smelled musty. They also observed mold on the windowsills and in the garage. They saw black dust coming from the air conditioning vents. Between 1999 and 2001, Kim and the Department's health and safety manager at the Building received complaints about water intrusion on various floors, air temperature and mold in the stairways.

According to Mesa Energy Systems engineer Robert Trommler, Building management did not approve the majority of the proposals his firm made to correct, replace and upgrade systems. Dr. Lee explained that this was because the LLC made repairs and purchased parts through a competitor, Carrier Corporation.

On September 6, 2000, compliance officers from the Division of Occupational Safety and Health (Cal-OSHA) tested the Building's water supply for the presence of

Legionella, which is a type of bacteria that can grow in stagnant water. Of the seven samples collected, four tested positive for Legionella. Test results showed Legionella present in the Building's cooling tower at a level of 2,220 organisms per milliliter. This was a high number that would not necessarily cause immediate danger to the Building occupants' health and safety, but which necessitated immediate notification to the Building's owner. The same test revealed the presence of Legionella in multiple other areas of the Building's water system. Cal-OSHA testing further revealed that water coming into the Building tested negative for Legionella, while cold water samples from inside the Building revealed the presence of Legionella.

In late September 2000, Kim informed Dr. Lee about the presence of Legionella bacteria in the Building and the claim that it was causing Building occupants to become ill; Dr. Lee asked Kim to keep him posted. Fung also learned about the Legionella and immediately went to Dr. Lee who told her he was taking care of it. Though neither Dr. Lee nor Kim ever personally took any steps to warn the Building's occupants about the presence of Legionella, they were aware that Barragan had been meeting with Cal-OSHA representatives in order to take the appropriate steps. Dr. Lee also participated in the decision to chlorinate the Building's water following the Cal-OSHA tests. Subsequent Cal-OSHA testing in early October 2000 showed that the Legionella in the cooling tower had been remediated, but that other parts of the Building's water supply still contained Legionella. Out of 20 samples, 12 tested positive for the presence of Legionella. At that point, the matter was referred to Cal-OSHA's medical unit. The Building's water system was super-chlorinated twice more before the water tested clear of Legionella.

Cal-OSHA issued a citation in February 2001 on the basis there was non-potable water in the Building's potable water system. Also in 2001, an air conditioning technician told Barragan multiple times that the Building's air conditioning system needed to be replaced; Barragan acknowledged the system's poor condition.

The Pleadings.

In December 2001, appellants filed a third amended complaint alleging causes of action for negligence and intentional infliction of emotional distress.¹ They alleged that at least 23 Department employees contracted Legionnaires' disease as a result of exposure to injurious conditions in the Building, and that all defendants owned, operated or managed the building; knew or should have known of those conditions; and failed to perform adequate maintenance and/or repair to remediate the conditions. They sought general, special and punitive damages. All defendants except Jamison answered in January 2002, generally denying the allegations and asserting several affirmative defenses. Jamison answered in October 2003.

Trial.

A jury trial commenced on August 18, 2005 and the jury began deliberating on October 5, 2005.

Evidence of Defendants' Conduct.

Appellants' water treatment expert, Herbert Conrad, Ph.D., opined that between October 1997 when the Building was purchased and March 3, 1998 when Department employees first occupied the building, the maintenance of the Building's water systems fell below the standard of care in the industry. Generally, Dr. Conrad opined that a building which had been vacant for four years should have had a thorough cleaning and disinfection of the water system. More specifically, the inadequate maintenance included the failure to disinfect water tanks, to clean the air conditioning vents, to inspect the backflow device separating the air conditioning water from the Building's potable water supply, to replace air filters and to clean and disinfect the cooling tower prior to occupancy. Mechanical engineer Matthew Freije further opined that the water system

¹ In November 2001, the trial court sustained a demurrer without leave to amend to appellants' causes of action seeking relief for a public and private nuisance; it thereafter dismissed defendant the County of Los Angeles from the matter and entered judgment in its favor.

should have been drained, physically cleaned and chlorinated after having been idle for such a long period of time.

With respect to the cooling tower, Dr. Conrad stated that Cal-OSHA requires a twice yearly cleaning and suggests that be doubled in the event of Legionella detection. A maintenance log of the Building for the period between October 1997 and October 2000 showed that the cooling tower had been cleaned only two out of 11 quarters and had not been disinfected prior to occupancy. Moreover, maintenance logs prior to occupancy indicated the presence of biofilm on the cooling tower, a condition which would also require quarterly cleanings. Freije opined that restarting the Building's water system after it had been idle for some time would release that biofilm into the system and contaminate it.

Dr. Conrad relied on Cal-OSHA's report showing a high level of Legionella present in the cooling tower and the presence of Legionella in multiple other areas of the Building's water system in forming his opinion that the Building's water system had not been properly maintained. He believed that Cal-OSHA regulations provided that Legionella at a level above 20 organisms per milliliter was unsafe, while Freije stated that Cal-OSHA deemed 10 organisms per milliliter an action level. Legionella bacteria were present in the cooling tower at a level of 2,220 organisms per milliliter.

Appellants' experts further opined that the Building was a "wet building," meaning that moisture was seeping into building materials where it did not belong, including the carpet and insulation. This environment allows for the growth of mold and fungi. They further opined the Building was not adequately disinfected after Legionella was found.

Defense experts opined that vapor from the Building's cooling tower could not have affected the air coming through the air conditioning vents. They further opined that the defendants' conduct, as well as the conduct of their staff, was within the standard of care and that the complaints by the Building occupants about the temperature and Building's condition would not have provided notice to them of any environmental hazard.

Evidence of the Consequences of Legionella Exposure.

Legionellosis is the clinical disease related to Legionella bacteria exposure. In order for an individual to contract Legionellosis from Legionella exposure, there must be a water source contaminated with Legionella, the contaminated water must get into the individual's lungs and the individual must be susceptible to the disease. Contaminated water can enter the lungs through an individual's inhaling water mist from a cooling tower or droplets from a sink, or through aspiration when an individual is drinking water and the water is accidentally choked into the lungs. Freije opined that appellants' exposure to Legionella came from one or both sources: the high level of Legionella in the cooling tower which entered the air and/or the high level of Legionella in the Building's potable water system.

Two clinical syndromes may occur under the umbrella of Legionellosis. An individual may develop Legionnaires' disease—an infection caused by Legionella exposure—which results in pneumonia secondary to the infection and requires antibiotic therapy. Alternatively, an individual may develop Pontiac Fever, which is a flu-like illness with flu-like symptoms that resolves within a few days spontaneously and results in no permanent consequences.

Approximately 80 percent of those who are exposed to Legionella will not show any evidence of infection and, as part of the immune system's normal reaction, will develop an antibody to the Legionella bacteria. In the other approximately 20 percent of instances, however, those who have had any illness or condition making their lungs sensitive may experience exacerbated reactive airway disease. Individuals with very sensitive lungs may also develop Legionella pneumonia, one of the major components of Legionnaires' disease. It is necessary to evaluate both an individual's blood tests as well as his or her symptomology in order to ascertain whether Legionnaires' disease has developed from exposure to Legionella.

Evidence of Appellants' Exposure and Injuries.

Wanda Cherry.

Lead plaintiff Wanda Cherry began working in the Building in June or July 1998. Although she had been ill for a couple of months before she moved into the Building, she was well at the time of the move. She started working on the fourth floor while it was still under construction and moved to the Building's fifth floor one year later. The air conditioning vent directly above her on that floor was extremely cold. In February 2000, she began getting severe colds from which she never fully recovered. Her fiancé noticed that she began to have trouble breathing and walking even short distances. In April 2000, she went on vacation from a Friday to a Monday and ended up sleeping almost the entire time. When she returned home, she went to the hospital and presented symptoms including diarrhea, fever, chills and chest pain. She was diagnosed with pneumonia and remained hospitalized for four days. Testing showed she had been exposed to Legionella bacteria and she was diagnosed with Legionnaires' disease. Thereafter, she returned home and received antibiotics; at the recommendation of Kenneth Burns, M.D., she remained at home for approximately two months.

She returned to work in June or July 2000. Most of her symptoms persisted; she suffered from shortness of breath, chest pain, chills, fever, dizziness and fatigue. At that point, she had also begun having seizures, or short periods where she would black out or lose consciousness. She asked to leave the Building at the end of 2001. She worked in the Department's North Hollywood office until June 2003 when she had a seizure that resulted in her taking an extended leave of absence.

Cherry continued to be treated for respiratory problems and her seizure disorder between 2000 and 2004. In December 2000, she saw Michael Glowalla, M.D., who determined through testing that her symptoms and seizures were not the result of any genetic disorder. Following an examination in 2003, Gopal Batra, M.D., opined that her Legionnaires' disease was significant and that it was more likely than not that the disease caused a mild disability in Cherry's lungs. Her pneumonia resulting from Legionnaires' disease and the Legionnaires' disease itself had damaged her lungs and made her more

susceptible to future respiratory infections. Dr. Batra further opined that Legionella exposure was one of the contributing factors to other lung problems Cherry experienced, including blood clots in her lungs. Howard Pitchon, M.D., rendered the same opinion and testified that Cherry had ongoing, chronic lung problems as a result of her Legionnaires' disease and that she would "absolutely" require future medical care.

At the time of trial, Cherry suffered from high blood pressure, irregular heartbeat, fatigue, shortness of breath, wheezing, headaches, nausea, periodic fevers and chest pain. She experienced a seizure at the end of her trial testimony one day, and was rushed to hospital and remained there for over four days. As a result of her Legionnaires' disease, Cherry had been unable to exercise and had difficulty keeping house and cooking.

Anthony Bazley.

Anthony Bazley began working on the Building's fifth floor in June 1999. He complained about the Building's musty smell when he moved in. He developed symptoms—including red eyes, congestion, a dry cough, fatigue and headaches—that would subside when he left the Building. He stopped exercising after work and often stayed home due to fatigue. He tested positive for exposure to Legionella and Dr. Pitchon opined on the basis of his examination and file review that Bazley's exposure occurred sometime after August 1999.² Although Dr. Pitchon opined that Bazley had recovered from the effects of his Legionella exposure, Bazley testified that he continued to suffer from fatigue, coughing and halted night breathing at the time of trial.

Alyce Beard.

Alyce Beard began working in the Building in 2001 and at that time developed headaches and started coughing and sneezing. Her desk was under a vent that blew alternately very hot or very cold air; she could also see dust coming out of the vent. She would cough so hard at work that she began wearing a mask over her nose and mouth.

² Legionella testing involves measuring the concentration of the antibody against the bacteria. A "titer," or level of bacteria in the system, of greater than one to 16 is considered positive.

She tested positive for Legionella exposure in both 2001 and 2003. Her symptoms, which remained at the time of trial, were consistent with such exposure and included chronic cough, fatigue and joint pain. James Lineback, M.D., recommended that she see an infectious disease specialist. She received several different prescriptions to treat her symptoms. On the basis of his examination, Dr. Batra opined that Beard's Legionella exposure created a reaction that made her lungs more sensitive; he could not opine to a reasonable medical probability that she would suffer any other long-term consequences from the exposure.

Stephanie Brown.

Stephanie Brown began working in the Building in June 1998 and continued to work there at the time of trial. After she moved into the Building, she began suffering from chills, fever, difficulty breathing, headaches and dizzy spells. She also suffered from wheezing and coughing. She tested positive for Legionella exposure. Dr. Pitchon opined that she suffered a severe respiratory tract infection as a result of her Legionella exposure.

Gloria Cabral.

Gloria Cabral started working in the Building sometime in late 1999 or early 2000. Thereafter, she began to feel very tired and suffered from coughing, sinus infections, ear infections, watery eyes, chills and chest pain. She visited a hospital emergency room three to four times during the year 2000 for ailments including severe headaches and infections. She also suffered from breast cancer in 2001 and underwent a radical mastectomy. She tested positive for Legionella exposure in June and August 2000. Dr. Pitchon opined that she suffered the effects of significant Legionella exposure and attributed her sinus and respiratory tract infections to that exposure.

Myrna Concepcion.

Myrna Concepcion began working in the Building in June 1999. At some point toward the end of 1999, she began experiencing fevers, chills, muscle aches, coughing, fatigue, diarrhea and incontinence. In November 2000, Concepcion was tested for exposure to Legionella and her test results were inconclusive. She received antibiotics to

treat her upper respiratory infection. Dr. Batra opined there was some probability that Concepcion's Legionella exposure caused some permanent lung disability.

Faith Coney.

Faith Coney worked part time in the Building beginning in 1998 and full time beginning in January 2000. After January 2000, she visited her doctor several times with various illnesses, including chills, coughing, shortness of breath, itching and a rash, and received prescriptions for antibiotics. She also went to her doctor with several respiratory infections between 2001 and 2003; her doctor declined to test her for exposure to Legionella because she did not believe Legionnaires' disease would present itself in the manner exhibited by Coney. Dr. Pitchon ordered testing, which came back positive for Legionella exposure. He opined that Coney's respiratory illnesses in 2001 were consistent with Legionella exposure and that she would suffer continued pulmonary problems as a result of that exposure, requiring future medical care.

Joel Geffen.

Joel Geffen moved to the Building in 1999. Between the time he started working there and 2002, he would get headaches daily. He also developed severe respiratory infections and flu-like symptoms including chills, sore throat, shortness of breath and burning eyes. He began wearing a mask over his nose and mouth whenever he was in the Building. He tested positive for Legionella exposure. When he transferred out of the Building in 2004, his symptoms disappeared, though he continued to use an inhaler daily. Dr. Pitchon attributed Geffen's respiratory problems to his Legionella exposure and opined that he will require ongoing medical care for those problems.

Martha Gomez.

In June 1999, Martha Gomez moved to the Building. A few weeks after she began working there, she began developing phlegm in her throat each morning and then began experiencing shortness of breath, fatigue, dizziness and body aches; she stopped exercising. She was tested in October 2000 for Legionella exposure. She continued to experience the same symptoms at the time of trial and Dr. Batra opined that Gomez had significant, chronic lung disease that will require ongoing care.

Linda Holzwarth.

Linda Holzwarth suffered from a variety of symptoms after she began working in the Building in June 1999, including eye irritation, throat problems, respiratory problems, fatigue and headaches. In 2003 she was diagnosed with hypersensitive lung disease and obstructive airway disease, which her doctor opined resulted from her exposure to a mold-contaminated work environment. Her symptoms were consistent with those resulting from a “sick building.” In 2003, she tested positive for Legionella exposure. Dr. Pitchon opined that the exposure had aggravated her respiratory tract problems and caused Pontiac Fever; he further opined that her respiratory problems necessitated long-term medical care. Also in 2003, psychologist Arthur Joseph Glaser, Ph.D. diagnosed Holzwarth as suffering from generalized anxiety disorder. Dr. Glaser attributed her disorder to exposure to events occurring at the Building, which included her testing positive for exposure to Legionella and the death of five coworkers between 1999 and 2001. He recommended that Holzwarth participate in individual psychotherapy on a weekly basis for one to three years.

Kimberly Jones.

After Kimberly Jones started working at the Building in 1998, she began suffering from headaches and a cough, and she could no longer take walks, help her children with homework, cook dinner or clean house after work. In 2000, she tested negative for exposure to Legionella bacteria, but later tested positive in June 2003. Dr. Pitchon diagnosed her as having significant, chronic respiratory problems consistent with Legionella exposure that would necessitate future medical care.

Sharon O’Brien.

Sharon O’Brien began working in the Building in August 1999. Approximately two months later, she began suffering from chills, congestion, coughing, light-headedness and fatigue. In 2000, she tested positive for exposure to Legionella. Dr. Pitchon attributed her respiratory problems to her Legionella exposure. At the time of trial, she continued to suffer from wheezing and shortness of breath, and experienced anxiety and fear concerning the long-term effects of her Legionella exposure. Dr. Pitchon opined she

would require future care to address her lifelong respiratory problems that began with her Legionella exposure. Following a 2003 examination, Dr. Glaser diagnosed O'Brien as having generalized anxiety disorder caused by the events which had occurred at the Building. He recommended that she receive weekly, individualized psychotherapy for a period of one to two years.

Cynthia Stokes.

Cynthia Stokes began working in the Building in June 1999. She suffered from severe colds, coughing, fever, sore throat, headaches and fatigue. These symptoms would subside during the weekend or whenever she was away from the Building. During the two years she worked in the Building, she required emergency room treatment several times—once for fatigue necessitating a blood transfusion, once for the inability to see and once for bronchitis. After she was transferred from the Building in November 2001, all symptoms except erratic breathing disappeared. Stokes tested positive for exposure to Legionella. Dr. Pitchon opined that Stokes had developed Pontiac Fever as a result of her Legionella exposure.

Georgiana Treder.

Georgiana Treder spent part of her time in the Building beginning in March or April 1998; she began experiencing pressure on her chest and sneezing during her time there. She tested positive for Legionella exposure in 2004. Dr. Pitchon opined that her Legionella exposure created long-term respiratory problems.

Brenda Wilson.

Brenda Wilson began working in the Building in June 1998. When she worked on the fourth floor during construction, she experienced sneezing, impaired breathing, congestion, headaches and ear infections. After she moved to the Building's fifth floor, her symptoms persisted, and she suffered from coughing and hoarseness. She tested positive for Legionella exposure in 2004. Her respiratory symptoms and fatigue continued to exist at the time of trial and Dr. Pitchon opined she would need future care and treatment as a result of her exposure.

Defense experts questioned the validity of appellants' Legionella testing and asserted that many of appellants' symptoms resulted from preexisting conditions unrelated to Legionella exposure. For example, Sheldon Spector, M.D., opined that, with the exception of Wanda Cherry who had been diagnosed with pneumonia, none of the appellants suffered Legionellosis—specifically, Pontiac Fever—as a result of Legionella exposure.

Nonsuited Appellants.

At the conclusion of appellants' case, the trial court granted nonsuit as to several individual appellants on the ground that there was no expert testimony on the issue of causation that would enable the jury to attribute their symptoms or injuries to Legionella exposure.

Dedrie Brown worked in the Building from 1999 to the present. In 2000, she began having constant prolonged colds, flu symptoms and headaches. She received antibiotics and an IV treatment for an infection. When she learned of the presence of Legionella in the Building, she stopped using the Building's water and her symptoms dissipated. Her Legionella test was negative and Dr. Pitchon was unable to render any diagnosis.

Phyllis Evans worked at the Building from March 2000 to the present. Not long after she began working there, she experienced flu-like symptoms and headaches every day. She received prescriptions for antibiotics several times during 2000 and 2001. Evans had been diagnosed with breast cancer in November 2000 and was away from work on disability for approximately two months. She had a compromised immune system that made her more susceptible to infectious diseases, including Legionnaires' disease. Her initial Legionella test was negative. Later testing suggested that Evans had been exposed to Legionella. She grew alarmed, anxious and worried about the contamination. Dr. Glaser examined her in September 2003 and diagnosed her as having adjustment disorder with mixed anxiety and depressed mood, which was caused by the events in her medical and work history. He recommended six to 12 months of weekly

psychotherapy. At the time of trial, Evans was still experiencing fatigue, headaches, sneezing, coughing and watery eyes.

Josephine Hill began working at the Building in June or July 1999. Around January 2000, she began to suffer from fever blisters, severe headaches, constant body aches, dry and itchy eyes, nausea and vomiting, fever and fatigue. Her blood pressure also began to escalate. Because of her symptoms, she was away from work for two weeks in or around July 2000. When she returned to work, she learned that there had been an outbreak of Legionella in the Building. She tested positive for exposure to Legionella. In 2001, Hill received treatment for an upper respiratory infection. Dr. Batra opined that Hill suffered from respiratory problems which may have resulted from Legionnaires' disease.

Octavia Johnson began working in the Building sometime around June 1999 and immediately began suffering from headaches and stomachaches. Symptoms related to her existing lupus condition also worsened. Johnson was tested for Legionella exposure in 2000; her doctor informed her that "traces" of the bacteria had been detected and Johnson received antibiotics. She was off work for several months between 1999 and 2002 due to illness. In 2003 she had a diminished lung capacity, but no significant airway obstruction. No tests were available to permit Dr. Batra to opine whether Johnson's lung condition resulted from Legionella exposure.

Kai Parker worked in the Building from July 1999 to sometime in 2000. She suffered from symptoms including chills, headaches, nausea, congestion and coughing. She received antibiotics in February 2000 which alleviated her symptoms. She tested positive for Legionella exposure.

Wilma Pickett began working on the fifth floor of the Building in June 1999. By August 1999 she began suffering from itchy eyes, a runny nose, a dry cough and headaches. She tested negative for Legionella exposure in 2003. Subsequently, she was treated for pneumonia and bronchitis.

Dwayne Polee began working at the Building from 1999 to 2001. He began experiencing flu-like symptoms and, after learning of the presence of Legionella in the

Building, tested positive for exposure to Legionella. When his symptoms, including fatigue and congestion, persisted, he again tested positive in 2001. At the time of trial, he still suffered from fatigue, congestion and burning eyes and often used an inhaler.

Sheryl Richardson was one of the first groups to move into the Building's fourth floor and worked there during part of 1998 and 1999. Once she began working there, she experienced shortness of breath, hives and watery eyes. Dr. Batra examined Richardson in 2003 and saw nothing during the exam or in her medical history to confirm Legionella exposure at that time. At the time of trial, Richardson needed to use an asthma inhaler when she did anything strenuous.

Verdicts.

The jury deliberated from October 5 through December 6, 2005 and returned verdicts on individual appellants as they reached them. The jury responded to a five-question special verdict for each individual appellant. With respect to Cherry, the jury found that the LLC and Jamison were negligent and their negligence was a substantial factor in causing her injuries. It awarded her a total of \$1,381,771.80, comprised of \$631,771.80 in economic damages and \$750,000 in noneconomic damages. As to Bazley, Beard and Brown, the jury found that the LLC was negligent, but not a substantial factor in causing injury, and that Jamison was not negligent. As to Concepcion, Coney and Stokes, the jury found that both the LLC and Jamison were negligent, but neither was a substantial factor in causing injury.

As to Cabral, Geffen, Gomez, Holzwarth, Jones, O'Brien, Treder and Wilson, the jury found that both the LLC and Jamison were negligent and both were a substantial factor in causing them injury. The jury awarded Cabral zero in economic damages and \$200,000 in noneconomic damages; awarded Geffen zero in economic damages and \$100,000 in noneconomic damages; awarded Gomez \$99,940 in economic damages and \$275,000 in noneconomic damages; awarded Holzwarth \$116,715.60 in economic damages and \$125,000 in noneconomic damages; awarded Jones zero in economic damages and \$75,000 in noneconomic damages; awarded O'Brien \$16,500 in economic damages and \$150,000 in noneconomic damages; awarded Treder zero in economic

damages and \$65,000 in noneconomic damages; and awarded Wilson \$86,940 in economic damages and \$75,000 in noneconomic damages.

Judgments were entered in March 2006 and the trial court thereafter denied motions for new trial submitted by both appellants and defendants. These appeals ensued.

DISCUSSION

Appellants challenge both the favorable and unfavorable judgments on several grounds. First, they contend the trial court erred in excluding evidence relating to the Building's condition two years after the injuries occurred. Second, they contend that the trial court abused its discretion in denying an ex parte application to augment their exhibit list. Third, they assert that the trial court's bias—evidenced by both hostile exchanges between the court and appellants' counsel and a commercial landlord-tenant relationship between one of the defendants and the trial judge's adult children—rendered the trial unfair. Finally, they challenge the trial court's grant of nonsuit as to the individual defendants, punitive damages claim, alter ego allegations and certain individual appellants. In their cross-appeal, defendants assert a single claim, arguing that substantial evidence did not support the damages awarded to Cherry. Finding no merit to any of these contentions, we affirm.

I. Appellants' Appeal.

A. Evidentiary Rulings.

Though appellants contend that the trial court issued a “blanket exclusionary order” regarding all evidence obtained after the filing of the lawsuit, the record demonstrates that the trial court issued several individualized evidentiary rulings, albeit several under the theory that defendants' conduct and the Building's condition after the alleged injuries occurred were irrelevant. We review the trial court's rulings on the admissibility of evidence for an abuse of discretion. (E.g., *People v. Williams* (1997) 16 Cal.4th 153, 196–197; accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 203 [“appellate

court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion”]; *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476 [same].) An abuse of discretion is established only where there is a clear showing the ruling exceeded the bounds of reason under all the circumstances. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639–640; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) Moreover, even if we conclude that evidence was improperly excluded, the error is not reversible unless it is reasonably probable a more favorable result would have been reached in the absence of the error. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Tudor Ranches, Inc. v. State Comp. Ins. Fund*, *supra*, at p. 1432.)

At the beginning of trial, the trial court sustained objections to portions of Dr. Conrad’s testimony. Dr. Conrad received his doctorate in biochemistry and appellants had designated him as an expert in the areas of water quality and water treatment. The trial court ruled that Dr. Conrad could not testify as a percipient witness regarding the condition of the Building in 2003 when he conducted his inspection, and that he could not testify as to whether the level of *Legionella* bacteria present in the Building was dangerous, given his other testimony that he had never come across *Legionella* until this particular case.³ However, Dr. Conrad was permitted to testify as to whether he observed anything during his 2003 Building inspection that contributed to his opinion the Building was inadequately maintained up to the year 2000.

Appellants also complain about the trial court’s ruling with respect to industrial hygienist Noreen Considine. She inspected the Building in 2003 and 2004 and was

³ Appellants complain about other sustained objections to Dr. Conrad’s testimony, but the record demonstrates that appellants were able to elicit the desired information from him by rephrasing their questions. In addition, we have not addressed several of appellants’ generalized and inaccurate complaints about the trial court’s specific evidentiary rulings. For example, they broadly contend that the trial court prevented fellow employees from testifying about appellants’ complaints regarding the condition of the Building, when the trial court actually ruled that a single fellow employee was not qualified to testify about the Building’s floor plan and cubicle assignments.

designated to testify regarding whether the Building's ventilation system was working properly to remove contaminants from the workplace. Out of the presence of the jury, the trial court questioned her expertise as well as her ability to render a relevant opinion on the basis of her inspection. Though appellants complain that the trial court erroneously excluded her testimony as irrelevant, the record establishes that the trial court ruled only that she could not testify as to the condition of the Building in 2003. The trial court sustained multiple objections to her testimony on the grounds that conditions in 2003 were irrelevant and that she was testifying to matters beyond her area of expertise. It also overruled several objections to her testimony and permitted her to testify that the Building's ventilation system appeared unchanged from its condition several years earlier and that there was no air supply shaft below the Building's fifth floor.

Further, appellants contend the trial court abused its discretion by excluding photographs of the Building taken in 2004 by percipient witness Benita Belardes on the ground they were irrelevant. Appellants' counsel initially indicated that the photographs depicted the condition of the Building in the year 2000 and the trial court sustained objections to the admission of the photographs when Belardes revealed that they were taken in October and November 2004.

Indeed, the trial court made numerous similar rulings excluding evidence, which are not specifically addressed on appeal, premised on the notion that the condition of the Building after December 2001—when appellants filed their complaint and alleged they had already suffered injury—was irrelevant. Although we disagree with the trial court's reason for exclusion, we conclude that the challenged evidence was properly excluded and that, in any event, appellants were not prejudiced by the rulings. (See, e.g., *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568 [“There is perhaps no rule of review more firmly established than the principle that a ruling or decision correct in law will not be disturbed on appeal merely because it was given for the wrong reason. If correct upon any theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion”].)

Contrary to the trial court's conclusion, expert testimony concerning examination and testing of the Building in 2003 and 2004 was not inherently irrelevant. "According to Evidence Code section 210 relevant evidence means any evidence having a rational tendency to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 Cal.App.3d 462, 467, fn. omitted.) Experts are routinely called upon to render opinions concerning past events or conditions. (E.g., *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37 [medical experts may testify concerning the standard of care without having knowledge of that standard at the particular time the alleged malpractice occurred]; *Buckwalter v. Airline Training Center* (1982) 134 Cal.App.3d 547, 553–554 [experts relied on defendants' training records to attempt to recreate the routes flown by the airplanes involved in the accident that was the subject of the lawsuit].) Likewise, photographs of the Building taken two to three years after appellants' injuries occurred may have been relevant to show the condition of the Building at the time of injury. (See *Slovick v. James I. Barnes Constr. Co.* (1956) 142 Cal.App.2d 618, 625 [““This general principle that a *prior* or *subsequent* existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a Presumption [citation]””].)

Nonetheless, we cannot conclude that the trial court abused its discretion in excluding the proffered expert testimony and photographs. Appellants failed to demonstrate that testimony regarding the level of Legionella present in the Building in 2003 was a matter within Dr. Conrad's area of expertise. And with respect to Considine, appellants were unable to demonstrate how the results of her air sampling in 2003 and 2004 were relevant to the air quality of the Building in 2000 when injuries occurred. The trial court has discretion to limit expert testimony and exclude that which is irrelevant, unreliable or beyond the area of expertise. (See Evid. Code, § 720; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523 [“the courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion”].) Further, appellants failed to demonstrate that the Building conditions depicted in the 2004 photographs, such as rust under the stairwell, were the

same conditions that existed in 2000 and 2001 at the time of injury. They likewise failed to establish that the photographer—a Department social worker who worked at the Building—possessed any expertise to extrapolate that the same conditions existed in the Building three to four years before she took her photographs.

In any event, even if we were to assume that the trial court abused its discretion in excluding any of the proffered evidence, appellants have failed to show they were prejudiced by the exclusion, i.e., that a miscarriage of justice occurred as a result of the ruling. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.) The erroneous exclusion of evidence does not warrant setting aside a judgment unless “the reviewing court is convinced after an examination of the entire case, including the evidence, that it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.] Prejudice from error is never presumed but must be affirmatively demonstrated by the appellant. [Citations.]” (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853–854.) The trial court’s rulings extended only to matters related to defendants’ conduct and the condition of the Building. It did not involve evidence related to appellants’ symptoms and condition at the time of trial, and appellants and their medical experts were permitted to testify about the lingering and permanent effects of Legionella exposure. Thus, the excluded evidence that appellants sought to introduce went solely to the issue of liability. Because the jury found that the LLC was negligent in each special verdict, we cannot conclude it is reasonably probable a more favorable result would have been reached had the evidence been admitted. Though the verdicts were divided on the issue of Jamison’s liability, appellants have made no effort to show how admission of the excluded evidence would have led to a more favorable result as to that party. (See *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1403 [appellants’ failure to identify evidentiary error that prejudiced them constituted waiver of contention on appeal]; *Hayman v. Block* (1986) 176 Cal.App.3d 629, 640 [same].)

Accordingly, the trial court’s evidentiary rulings afford no basis for disturbing the judgment.

B. Ex Parte Application to Amend Exhibit List.

At a July 7, 2005 hearing, defense counsel indicated that appellants sought to add hundreds of previously unidentified exhibits to their exhibit list. At that point, the trial court identified the process appellants were to follow in order to add exhibits to their exhibit list. If an exhibit had been produced to the defendants, appellants would be permitted to explain why it had not been on the exhibit list, and the trial court would make a determination on the basis of that explanation. Any exhibit not previously produced to the defense would be disallowed.

The parties returned to court on July 11, 2005, when appellants filed an ex parte application seeking to supplement their exhibit list. At that point, the trial court did not rule on the application, but stated that appellants had failed to follow the procedure outlined by the court four days earlier. At a subsequent hearing, appellants indicated that they would seek to add approximately nine boxes of documents to their exhibit list. Contrary to appellants' representation on appeal, the trial court did not state it intended to allow the exhibits. Rather, the trial court noted that the defense indicated it would have no objection to the exhibits, provided appellants could demonstrate the documents were items which the defense had not produced earlier. On August 15, 2005, the matter was transferred to a different trial judge for trial, and the former judge indicated that it would be appropriate for the trial judge to resolve the issue.

Although appellants complain that the trial judge to whom the case was ultimately assigned abused his discretion by denying the ex parte application, they fail to indicate whether they made any effort to comply with the prior judge's directive to demonstrate why the excluded documents should be added to the exhibit list. "It is . . . well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. [Citation.]" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) "That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation . . . in order to insure the orderly administration of justice. [Citation.]" (*Ibid.*) Accordingly, courts may adopt suitable methods of practice and formulate rules

of procedure where justice demands. (*Ibid.*) Here, the trial court did nothing more than adopt the prior trial judge’s standards, requiring appellants to make a requisite showing of their entitlement to add the requested documents to the exhibit list. Absent any indication appellants complied with that directive, we find no basis to disturb the trial court’s denial of their ex parte application.

C. Judicial Bias.

Appellants further contend that reversal is required because the trial court was biased against appellants as evidenced by the court’s demeanor toward appellants’ counsel during trial and the fact that the trial court’s adult children were in a commercial relationship with some of the defendants. In August 2005, the trial court denied appellants’ motion pursuant to Code of Civil Procedure section 170.1 brought on these grounds. Generally, a petition for writ of mandate pursuant to Code of Civil Procedure section 170.3, subdivision (d) is the exclusive means by which a party may seek review of an unsuccessful challenge for cause under Code of Civil Procedure section 170.1. (*People v. Hull* (1991) 1 Cal.4th 266, 273–274; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2:259.3, p. 2–121 (rev. # 1, 2006).) But because appellants have not directly challenged the denial of their motion and because defendants have not raised this procedural infirmity and elected to respond to the claim on the merits, we, too, will address appellants’ argument on the merits.

Code of Civil Procedure section 170.1 provides in relevant part: “(a) A judge shall be disqualified if any one or more of the following is true: [¶] . . . [¶] (3)(A) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding. [¶] (B) A judge shall be deemed to have a financial interest within the meaning of this paragraph if: [¶] (i) A spouse or minor child living in the household has a financial interest. [¶] (ii) The judge or the spouse of the judge is a fiduciary who has a financial interest. [¶] (C) A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household. [¶] . . . [¶] (6)(A) For any reason: [¶] . . . [¶] (iii) A person aware of the facts might reasonably

entertain a doubt that the judge would be able to be impartial. [¶] (B) Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.”

“A judge’s impartiality is evaluated by an objective, rather than subjective, standard.” (*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349; see also *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) The question is whether a reasonable person ““““would entertain doubts concerning the judge’s impartiality.”””” (*Hall v. Harker, supra*, at p. 841; accord, *Ceriale v. AMCO Ins. Co.* (1996) 48 Cal.App.4th 500, 504.) On appeal, we undertake a “review of the record” to determine whether appellants were deprived of their “constitutional right to a fair and impartial tribunal.” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) Our task is to “assess whether any judicial misconduct or bias was so prejudicial that it deprived [appellants] of ““a fair, as opposed to a perfect, trial.”” [Citations.]” (*Ibid.*) “Potential bias and prejudice must clearly be established [citation] and statutes authorizing disqualification of a judge on grounds of bias must be applied with restraint. [Citation.]” (*Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724.) “Neither strained relations between a judge and an attorney for a party nor ‘[e]xpressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice. [Citation.]’ [Citation.]” (*Ibid.*)

It is a slight understatement to say that our review of the record revealed strained relations between the trial court and appellants’ counsel. Though the worst of the trial court’s and appellate counsel’s comments occurred outside the presence of the jury, we must commend the jury for its patience and careful consideration of the evidence in the face of repeated hostile and discourteous exchanges between the trial court and appellants’ counsel. On the basis of our review of the record, however, we cannot conclude that these incidents in any way deprived appellants of a fair trial. (E.g., *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1031–1032 [“[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given

during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action”’].) The trial court’s comments did not reflect any bias against appellants, but rather, were precipitated by appellants’ counsel’s refusal to accept the trial court’s evidentiary rulings and other admonitions. While the trial court could have exercised a bit more restraint on occasion in responding to counsel’s verbal confrontations, we understand why the trial court reacted as it did.

A few examples of the trial court’s and counsel’s exchanges illustrate the tense atmosphere that characterized this trial. Out of the presence of the jury, appellants’ counsel argued that Considine should be permitted to testify as to the Building’s condition in the year 2000 on the basis of her 2003 inspection, notwithstanding that the evidence showed changes to the ventilation system during that period. In response to the trial court’s comment that those changes undermined counsel’s argument, counsel responded to the court: “That’s what you think. How would you know, you’re not an industrial hygienist.” In connection with appellants’ counsel’s questioning Fung, the trial court sustained several objections, which prompted the following exchange in front of the jury: “The Court: Sustained. Irrelevant whether you understand or not the answer she just gave you. Sustained. [¶] Mr. Shtofman: Haven’t asked the question. May I ask a question? [¶] The Court: No. I want you to stop this badgering. [¶] Mr. Shtofman: I’m not badgering at all, your honor. [¶] The Court: Yes, you are. [¶] Mr. Shtofman: No, I’m not. [¶] The Court: You are, counsel, and I want you to stop it.” In connection with appellants’ counsel’s cross-examination of water treatment service provider Johnnie Timmons, where counsel sought to inquire about maintenance records after 2001, another typical exchange occurred in front of the jury: “The Court: Counsel, December 31, 2001, is the cutoff. [¶] Mr. Shtofman: It’s for impeachment. It doesn’t matter. [¶] The Court: It’s not for impeachment. Anything that—what happened after 2001, as far as maintenance is concerned, is irrelevant. [¶] Mr. Shtofman: Not if it’s—[¶] The Court: Sustained. I’m not going to argue anymore with you. That’s my ruling. I don’t want to hear anymore on the subject. [¶] Mr. Shtofman: That’s fine, sir. [¶] The Court: Thank you. [¶] By Mr. Shtofman Q: Sir, the records that I presented before you—. [¶] The

Court: No. That's stricken. You're admonished not to refer to—. [¶] Mr. Shtofman: Let me finish my question. [¶] The Court: No. You may not finish. You're to be quiet. And you're not to refer to those records again."

At the conclusion of trial, the trial court summarized: "[T]his is the worst case I've had to try in 30 plus years. The demeanor, what's happened in this case, I have never seen it. And I've tried, you know, I've tried probably at least a thousand cases. And I have never, ever had the conduct, the disrespect, the misleading statements of the attorneys to the court. I've never in all my time ever [had to] issue [an] order to show cause re contempt. Ever. But this is what's caused this."

Indeed, throughout the course of the trial, the trial court and appellants' counsel engaged in a back-and-forth over evidentiary issues on which the trial court had already ruled. But as aptly illustrated by the following exchange before the jury, at the end of all the tense exchanges, appellants' counsel was generally able to elicit the desired information. In connection with appellants' counsel's examination of Bruce Gillis, M.D., Holzwarth's treating physician, the trial court sustained an objection for lack of foundation to a question seeking Dr. Gillis's conclusions about Holzwarth's condition. Seeking to overcome that deficiency, counsel asked: "Q: And what were her symptoms when you examined her? [¶] The Court: He just testified he saw her in 2003, so that's irrelevant as to what the symptoms were. [¶] Mr. Shtofman: Breaks a leg, come in to the doctor two years later crippled. Your opinion it's irrelevant for purposes of their position? [¶] The Court: I've made my ruling outside the presence of the jury. You know what the ruling is, and you may proceed. [¶] Mr. Shtofman: I don't understand the ruling. [¶] The Court: I just ruled when he saw her in 2003 is irrelevant to this lawsuit. [¶] Mr. Shtofman: So the plaintiffs' damages are restricted on the time period even if they're still suffering? A person's paraplegic, they can't talk about their damages? I want to know. [¶] The Court: You can talk about—the way you phrase your question counsel. Rephrase your question as to exactly what the conditions were at the time he saw her in 2003. [¶] Q: By Mr. Shtofman: What were the conditions at the time you saw Ms. Holzwarth in 2003? [¶] A: [By Dr. Gillis]: She had continuing

medical symptoms based upon what was diagnosed to be wrong with her in the year of 2000. [¶] Q: I'm sorry? [¶] A: She had continuing medical complaints in reference to health problems that were first acknowledged in 2000, and she told me that they had continued to affect her in 2002, 2001, and there were other complaints subsequent to that."

Though the trial court repeatedly admonished appellants' counsel not to question its rulings, the cumulative effect of those admonitions did not create the level of unfairness present in *People v. Sturm* (2006) 37 Cal.4th 1218, 1243–1244. There, throughout the defendant's penalty phase, the trial court repeatedly interjected comments that effectively undermined the defense's theory of the case. For example, the trial court stated that "it was a 'gimme' that defendant had premeditated the murders despite knowing from the first penalty phase trial that defendant's *lack* of premeditation was a central piece of defendant's case in mitigation"; made sarcastic remarks about defense expert witnesses and their qualifications; and "comment[ed] on defense counsel's training, blaming defense counsel for the length of the penalty phase trial, and specifically pointing out to the jury that he had ruled against defense counsel '99 times out of 100.'" (*Id.* at p. 1244.) Nor did the trial court's comments here approach the level of unfairness and bias exhibited in *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 462–463, where "[i]n its lengthy discourse, the court recited a veritable litany condemning and impugning the character of undocumented immigrants, including plaintiff, who place a burden upon the taxpayers by obtaining educational, medical, housing, and other services ('yada, yada,' i.e., the list goes on) to which they are not entitled, and then add insult to injury by suing the providers, such as 'the good doctor [defendant]' in order to make 'a pot of [undeserved] money.'"

Because the trial court's comments here were confined to and prompted by appellants' counsel's failure to accept its evidentiary rulings and were not directed to the merits of appellants' case or counsel's ability to present that case, we find no merit to appellants' claim that reversal is required on the ground of judicial bias. (See *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219 [declining to hold

“that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias”].)

Nor do we find any merit to the second prong of appellants’ bias claim regarding the commercial relationship between the trial court’s adult children and one of the defendants. The only indication of this relationship was contained in appellants’ moving papers in support of the motion brought pursuant to Code of Civil Procedure section 170.1, which stated: “Two days ago, Plaintiffs’ counsel were informed that an existing lessor lessee relationship exists between the trial court judge’s son and daughter, Ricardo A. Torres II and Debbie Diaz (indiv. and dba Diaz Medical Billing Services), on the one hand and defendants, Jamison Properties, Inc. and David Lee, on the other hand. Yesterday, Plaintiffs’ counsel confirmed that Mr. Torres and Ms. Diaz (indiv. and dba Diaz Medical Billing Services) are each tenants at 3699 Wilshire Boulevard, Suite 1140, Los Angeles, California and that their landlord is Jamison Properties, Inc., a defendant in this case that co-defendant David Lee owns 100%.”

By statute, a trial judge may be disqualified for bias where a spouse or minor children living in the household have a financial interest in the matter. (Code Civ. Proc., § 170.1, subd. (a)(3)(B)(i).) The statute does not provide that any financial relationship involving a trial court’s adult children living outside the home may be indicative of bias, and appellants have not directed us to any authority that would suggest bias may be established solely by the existence of such a relationship. We decline to disturb the judgment in the absence of any showing that the relationship tended to affect the trial court’s conduct in the matter, thereby rendering the trial unfair. (See *Gantner v. Gantner* (1952) 39 Cal.2d 272, 279 [prejudice not shown where “[t]here is nothing in the record to indicate that the personal life of the trial judge led him to be biased against” the appellant].)

D. Nonsuits.

As explained in *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1476: “During trial a court can grant a nonsuit in a defendant’s favor as to some or all of the issues involved in the action. ([Code Civ. Proc.,] § 581c, subd. (b).) As with

the directed verdict . . . , if the partial nonsuit is granted, final judgment is postponed until termination of the action at which time judgment is awarded as determined by any matters in the trial as well as by the order for nonsuit. [Citation.]” “A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.” (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; accord, *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117.) “In determining the sufficiency of the evidence, the trial court must not weigh the evidence or consider the credibility of the witnesses. Instead, it must interpret all of the evidence most favorably to the plaintiff’s case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the plaintiff. If the plaintiff’s claim is not supported by substantial evidence, then the defendant is entitled to a judgment as a matter of law, justifying the nonsuit. [Citation.]” (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541.) We review a grant of nonsuit de novo, employing the same standard governing the trial court. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214–1215; *Saunders v. Taylor, supra*, at pp. 1541–1542.)

Here, at the conclusion of appellants’ case, defendants moved for nonsuit as to several claims and parties on the ground that appellants’ evidence was insufficient to go to the jury. Specifically, the trial court granted nonsuit as to appellants’ claim for punitive damages, the issue of alter ego liability, the cause of action for intentional infliction of emotional distress and the liability of individual defendants Dr. Lee and Fung. It also granted nonsuit against several individual appellants on the ground there was no evidence of causation. Appellants challenge each ruling except as to the cause of action for intentional infliction of emotional distress.⁴

⁴ Although appellants quote the written motion for nonsuit in their opening brief, they have not included the moving or opposition papers (if any) in the clerk’s transcript. Generally, the “[f]ailure to provide an adequate record on an issue requires that the issue be resolved against plaintiff.” (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502; see also *Mountain Lion Coalition v. Fish & Game Com.* (1989)

1. *Punitive Damages.*

“[A] nonsuit on the issue of punitive damages is proper when no reasonable jury could find the plaintiff’s evidence to be clear and convincing proof of malice, fraud or oppression.” (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60–61.) To recover punitive damages, Civil Code section 3294, subdivision (a) requires a plaintiff to “prove[] by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” Mere carelessness or ignorance on the part of a defendant—the type of “[u]nreasonable and negligent [conduct that] falls within the common experience of human affairs”—is insufficient to support an award of punitive damages. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 892; accord, *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1051 (*American Airlines*).) Rather, the defendant must exhibit “‘*such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.*’ [Citation.]” (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894–895.) “‘Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff’s rights, a level which decent citizens should not have to tolerate.’” (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.)

The “malice” required by Civil Code section 3294 “‘implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others.’ [Citations.]” (*Taylor v. Superior Court, supra*, 24 Cal.3d at p. 894.) To establish malice in the absence of intentional conduct, a plaintiff must demonstrate that the defendant’s

214 Cal.App.3d 1043, 1051, fn. 9 “[T]he appellant has the burden of affirmatively demonstrating error by providing an adequate record. [Citations.] A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed”].) Because all parties have briefed the issue notwithstanding the deficient record, we will address the granting of the nonsuits on the merits, albeit confined by our review only of the reporter’s transcript of the hearing.

conduct was both (1) “despicable” and (2) “carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (Civ. Code, § 3294, subd. (c)(1).)

These two requirements are distinct and independent; the requirement that conduct be “despicable” was added to the statute in 1987 to impose “a new statutory limitation on the award of punitive damages.” (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331 (*Mock*).) “[D]espicable” is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ [Citation.]” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725; see also *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 817 [“‘Despicable’ conduct” is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people”]; *American Airlines, supra*, 96 Cal.App.4th at p. 1050 [despicable “conduct has been described as “[having] the character of outrage frequently associated with crime”].)

The second requirement, “willful and conscious disregard,” requires a demonstration that the defendant was aware that his or her conduct would have “probable dangerous consequences” and that he or she “willfully fails to avoid such consequences.” (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228; *Mock, supra*, 4 Cal.App.4th at p. 329.) Courts have articulated a three-part test containing the elements necessary to raise a negligent act to the level of willful misconduct: “(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. [Citations.]” (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689–690.) The test is objective—i.e., whether a reasonable person in the same or similar circumstances as the defendant would be aware of the dangerous character of his or her conduct. (*Id.* at p. 690.)

In addition, a corporation, such as the LLC or Jamison, may be held liable for punitive damages upon a showing by clear and convincing evidence that “an officer, director, or managing agent” “had advance knowledge of . . . or authorized or ratified the

wrongful conduct for which the damages are awarded.” (Civ. Code, § 3294, subd. (b); see also *Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 932; *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 167.)

The trial court properly ruled that appellants’ evidence failed to satisfy these requirements. While the evidence appellants point to on appeal shows that defendants were negligent in maintaining the Building, it does not show the type of base or vile behavior rendering their conduct despicable, nor does it establish they were aware of or willfully failed to avoid dangerous consequences. Rather, the evidence showed that at the time of purchase the LLC hired an air conditioning service to conduct an overhaul of the Building’s air conditioning system. Defendants further took steps to ameliorate the *Legionella* problem once it was discovered. Other witnesses confirmed that additional steps were taken over time. For example, air conditioning engineer Trommler observed in 2001 that the Building’s cooling tower was old and recommended to Dr. Lee that it be replaced. Dr. Lee followed that recommendation and replaced the cooling tower approximately three to six months later. Though Trommler indicated to Dr. Lee, Kim and Barragan that other parts of the air conditioning system were in disrepair and need of replacement, he told them that the risks of operating the existing system were inconsistent temperatures and stale, non-circulating air. In 2001, Kim approved replacement of some of the coils that were leaking, but indicated he did not have the budget for additional repairs. In addition, Dr. Lee did not install a new chiller in the Building until 2003, despite a recommendation in 2002 that he do so. The air conditioning service provider who made the recommendation, Robert Hubner, testified that the equipment seemed “old”; he neither stated that it posed the potential for danger nor commented that there was anything unusual about Dr. Lee’s delaying the equipment purchase for some period of time.

Further, appellants cite to the testimony of Linda Stetzenbach, Ph.D., which involved the results of her air sampling in 2001 showing the presence of various types of fungi in the Building. Yet her testimony did not address whether defendants were aware of the presence of that fungi or the conditions that created it. Likewise, appellants cite to

evidence that in early 2000 a Department employee complained about the Building's smell and the presence of water leaks to Building maintenance employees. She did not and could not testify as to Dr. Lee's and Fung's knowledge of her complaints at that time. Certainly, while appellants' evidence established that defendants were at times inattentive and slow to implement repairs to equipment that they knew caused some level of discomfort to Department employees, the evidence did not show that defendants' conduct was of such an outrageous nature to support a claim for punitive damages. (See, e.g., *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210 [““Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages””]..)

The cases appellants have cited afford them no support and, indeed, most have no bearing on the question before us. In *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 859, the court affirmed summary judgment, finding that the undisputed evidence showed the absence of willful or malicious conduct on the part of the defendant and that any triable issue of fact on the question of negligence was insufficient to overcome statutory immunity. In *New v. Consolidated Rock Products Co.*, *supra*, 171 Cal.App.3d at pages 691 to 692, the court rejected the argument that punitive damages should be limited to situations where a defendant acts with a subjectively culpable state of mind. The court in *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 806, overruled an order sustaining a demurrer to a complaint that included a claim for punitive damages where the plaintiff alleged the landlord defendants knowingly concealed information concerning prior rapes and misrepresented the adequacy of security measures to induce the plaintiff to rent an apartment. None of these cases involve circumstances analogous to those here, where the evidence failed to show that defendants were aware of the dangerous consequences of their inaction.

Appellants also seek support from *Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279 (*Nolin*). There, the court found substantial evidence supported a jury's punitive damages award against the corporate owner of a service station where

the plaintiff slipped and fell in a puddle of motor oil and gasoline. The evidence established that for months both customers and employees had complained about a broken gasoline pump which tended to overflow onto the ground and onto customers. When management refused to fix the pump, employees tried to alert the public by posting signs or by making public service announcements. Management feared the loss of business and reputation and ordered the employees to stop their efforts. In addition, the service station sold oil cans and permitted customers to add oil to their cars in the pumping areas. As a consequence, the poorly lit surface was often covered with pools of oil and littered with empty oil cans. Cleanup around the service station was sporadic and haphazard, and employees were not trained to clean the area. (*Id.* at pp. 282–284.) When the service station supervisor was informed of prior accidents he allegedly responded, “the store didn’t have anything to worry about because they had a team of lawyers that would tie it up in court for years.” (*Id.* at p. 283.)

Given this evidence, the *Nolin* court found substantial evidence of conduct warranting the imposition of punitive damages: “Defendant’s established inattention to the danger showed a complete lack of concern regarding the harmful potential—the probability and likelihood of injury. The entire nature of defendant’s operation, as it was presented to the jury, reflected defendant’s overriding concern for a minimum-expense operation, regardless of the peril involved. This concern was evidenced by the method of deployment of clerks, the absence of maintenance personnel, and the absence of necessary equipment for handling oil sold to customers. The evidence also established that the employees who observed the danger daily communicated it upward to supervisory personnel, but to no avail.” (*Nolin, supra*, 95 Cal.App.3d at p. 288.) Here, in contrast, appellants failed to present evidence of either established inattention or complete lack of concern regarding the potential for personal injury. Unlike *Nolin*, the defendants here employed maintenance personnel, they had no knowledge of prior incidents of injury resulting from the Building’s condition, they responded to the discovery of *Legionella* by providing appropriate water treatment, and they repaired and

replaced equipment thereafter. As a result, *Nolin* provides no basis for reversal of the grant of nonsuit on appellants' claim for punitive damages.

2. *Alter Ego.*

A corporation, including a limited liability corporation, is considered a legal entity separate and apart from its officers, directors and shareholders. As explained in *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1212 (*Pacific Landmark*), a limited liability company consists of members ““who own membership interests [citation]. The company has a legal existence separate from its members . . . but . . . the members . . . actively participate in the management and control of the company [citation]” [citation].’ [Citation.]” (*Id.* at p. 1212.) “While generally *members* of a limited liability company are not personally liable for judgments, debts, obligations, or liabilities of the company ‘solely by reason of being a member’ (Corp. Code, § 17101, subd. (a)), they are subject to liability under the same circumstances and to the same extent as corporate shareholders under common law principles governing alter ego liability and are *personally* liable under the same circumstances and extent as corporate shareholders. [Citations.]” (*Ibid.*)

“The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff’s interests. [Citation.] In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation: ‘As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for [the] acts done in the name of the corporation.’ [Citation.]” (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) The conditions under which the corporate entity will be disregarded vary according to the circumstances of each case. (*Ibid.*; *Tomaselli v. Transamerica Ins. Co.*, *supra*, 25 Cal.App.4th at p. 1285, fn. 13.) Two general requirements must be met before the corporate veil will be pierced: ““(1) [T]hat

there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.’ [Citation.]” (*Mesler v. Bragg Management Co.*, *supra*, at p. 300.)

The question of whether to apply the alter ego doctrine is within the province of the trial court; there is no right to a jury trial to determine alter ego liability. (See *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 147–148.) It is appellants’ burden to overcome the presumption that a corporation is a separate legal entity. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212.) We review the trial court’s ruling under the substantial evidence test. (*Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 46–47.)

Courts consider myriad factors in determining whether there is a unity of interest between an individual and a corporation, including whether the corporation was adequately capitalized, whether corporate formalities were observed, whether personal and corporate assets were commingled, whether corporate assets were diverted for personal use or whether the corporate shell was used merely as a conduit for individual ventures. (*Tomaselli v. Transamerica Ins. Co.*, *supra*, 25 Cal.App.4th at p. 1285, fn. 13; *Mid-Century Ins. Co. v. Gardner*, *supra*, 9 Cal.App.4th at p. 1213, fn. 3.) Substantial evidence supported the trial court’s determination that appellants had failed to offer evidence supporting the existence of any of these factors. On appeal, the only evidence that appellants cite in support of their alter ego theory is the testimony of Joon Song, a former assistant property manager for another building owned by Dr. Lee who also worked as an assistant manager for tenant improvements for approximately one year at the Building; he stated that he was paid by check directly from Dr. Lee rather than from a corporation. The other evidence offered by appellants—Dr. Lee’s testimony—established that he followed corporate formalities in setting up different management companies for two properties he owned through limited liability corporations. Though appellants tried to insinuate that Dr. Lee had commingled assets when one of those management companies signed an agreement with a company to overhaul parts of the

Building's air conditioning system while the Building was in escrow, Dr. Lee testified that he simply had not considered the title of the contracting entity significant at that early stage of the investment. As the trial court recognized, this limited evidence failed to establish the unity of interest necessary to pierce the corporate veil.

Moreover, even if appellants had offered sufficient evidence to show a unity of interest, there was no evidence establishing that it was inequitable to recognize the corporate form. As aptly stated in *Mid-Century Ins. Co. v. Gardner*, *supra*, 9 Cal.App.4th at page 1213: “Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an “inequitable result.” In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct *amounting to bad faith* makes it inequitable, under the applicable rule above cited, for the equitable owner of a corporation to hide behind its corporate veil.” Accordingly, the trial court properly ruled that appellants failed to meet their burden to support application of the alter ego doctrine.

E. Individual Defendants.

The trial court granted nonsuit in favor of Dr. Lee and Fung on the ground that appellants failed to offer sufficient evidence that would permit the jury to find those defendants personally liable. Though appellants contend this ruling was error, they have failed to identify any evidence establishing Dr. Lee's and Fung's personal participation in or specific authorization of tortious conduct. (See *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503–504 (*Frances T.*).)

Generally, “[d]irectors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done.” (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595.) The statutory scheme governing limited liability companies, Corporations Code section 17000 et seq., provides for a comparable exclusion of personal liability for members and managers of a California

limited liability company. Corporations Code section 17101, subdivision (a), provides in relevant part that “no member of a limited liability company shall be personally liable . . . for any . . . liability of the limited liability company, whether that liability . . . arises in contract, tort, or otherwise, solely by reasons of being a member of the limited liability company.” (See also Corp. Code, § 17158, subd. (a) [“No person who is a manager or officer or both . . . of a limited liability company shall be personally liable . . . for any . . . liability of the limited liability company, whether that liability . . . arises in contract, tort, or otherwise, solely by reason of being a manager or officer or both . . . of the limited liability company”].)

The court in *Pacific Landmark*, *supra*, 129 Cal.App.4th at page 1212, clarified that “[w]hile generally *members* of a limited liability company are not personally liable for judgments, debts, obligations, or liabilities of the company ‘solely by reason of being a member’ [citation], they are subject to liability under the same circumstances and to the same extent as corporate shareholders under common law principles governing alter ego liability and are *personally* liable under the same circumstances and extent as corporate shareholders. [Citations.]” Accordingly, “whereas managers of limited liability companies may not be held liable for the wrongful conduct of the companies *merely* because of the managers’ status, they may nonetheless be held accountable under Corporations Code section 17158, subdivision (a) for their personal participation in tortious or criminal conduct, even when performing their duties as manager.” (*Id.* at p. 1213.)

Though the *Pacific Landmark* court analogized the extent of a limited liability company member’s liability to that of a corporate shareholder, the standard is more akin to that governing corporate officers and directors. As explained in *Frances T.*, *supra*, 42 Cal.3d at pages 503 to 504: “It is well settled that corporate directors cannot be held *vicariously* liable for the corporation’s torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. [Citation.] ‘[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to

which he has not consented. . . . While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct.’ [Citation.]” Thus, in order “[t]o maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed or participated in the allegedly tortious conduct [citation]; or that although they specifically knew or reasonably should have known that some hazardous condition or activity under their control could injure plaintiff, they negligently failed to take or order appropriate action to avoid the harm [citations]. The plaintiff must also allege and prove that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances.” (*Id.* at pp. 508–509; see also *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, *supra*, 1 Cal.3d at p. 595 [corporate officers and directors “are not responsible to third persons for negligence amounting merely to nonfeasance, to a breach of duty owing to the corporation alone; the act must also constitute a breach of duty owed to the third person”].)

Identifying a further limitation on the personal liability of corporate officers and directors, the court in *Frances T.* acknowledged that “directors sometimes must make difficult cost-benefit choices without the benefit of complete or personally verifiable information. For this reason, even if their conduct leads directly to the tortious injury of a third party, directors are not personally liable in tort unless their action, including any claimed reliance on expert advice, was clearly unreasonable under the circumstances known to them at that time. This defense of reasonable reliance is necessary to avoid holding a director personally liable when he or she reasonably follows expert advice or reasonably delegates a decision to a subordinate or subcommittee in a better position to act.” (*Frances T.*, *supra*, 42 Cal.3d at p. 509, fn. omitted.)

Here, the trial court properly ruled that appellants’ evidence failed to establish the requisite unreasonable behavior necessary to render Dr. Lee and Fung personally liable. On appeal, appellants point to evidence that Dr. Lee and Fung acted as managers of the LLC. But as explained in *Pacific Landmark*, *supra*, 129 Cal.App.4th at pages 1212 to

1213, managers may not be held personally liable merely because of their status as managers. In terms of Dr. Lee's and Fung's personal participation, the evidence showed that they supervised the management of the Building and hired individuals to provide day-to-day management of the Building in their role as managing members of the LLC. They relied on outside contractors to provide service for specific components of the Building, such as the air conditioning system. Beyond Fung's testimony that she heard a rumor people were getting sick in the Building around the time that Cal-OSHA tested the Building, there was no evidence to suggest that prior to Cal-OSHA's September 2000 testing Dr. Lee or Fung knew the Building's condition was potentially injurious to its occupants. Indeed, Barragan did not inform Dr. Lee and Fung of Cal-OSHA's September 2000 inspection until after the fact.

Under these circumstances, where appellants attempt to impose personal liability on Dr. Lee and Fung by virtue of their roles in the LLC that owned the Building, we are guided by the court's observation in *Frances T.*, *supra*, 42 Cal.3d at pages 506 to 507: "Virtually any aspect of corporate conduct can be alleged to have been explicitly or implicitly ratified by the directors. But their authority to oversee broad areas of corporate activity *does not, without more*, give rise to a duty of care with regard to third persons who might foreseeably be injured by the corporation's activities." (Italics added.) (See *Towt v. Pope* (1959) 168 Cal.App.2d 520, 530 ["In the absence of active participation in an act of misfeasance, generally an officer of a corporation is not personally liable to a third person for nonfeasance"].) In *Frances T.*, the evidence giving rise to a duty included that the directors were in the position of landlord with respect to plaintiff's condominium complex; they were made aware of a dangerous condition in the condominium complex; and though they were the only persons in a position to remedy the hazardous condition, they took no action. As a result, the plaintiff was raped on the premises. (*Francis T.*, *supra*, at pp. 509–510.) Here, in contrast, the evidence showed that Dr. Lee and Fung were unaware of the potential health risk the water supply and air conditioning system posed to Building occupants and took steps to eliminate the risk once they were made aware of the presence of *Legionella*. Appellants' evidence failed to

establish that Dr. Lee and Fung actively participated in wrongful conduct, knew or should have known that the Building's condition was potentially harmful to appellants and failed to take action to mitigate that harm, or unreasonably relied on subordinates and contractors to maintain the Building. Nonsuit was properly granted.

F. Individual Appellants.

The trial court also granted nonsuit as to appellants Brown, Evans, Hill, Johnson, Parker, Pickett, Polee and Richardson on the ground that those appellants failed to establish to a reasonable medical probability their exposure to *Legionella* caused the symptoms and/or injuries of which they complained. Appellants contend that expert testimony on causation was not required and that their own testimony concerning their symptoms and injuries was sufficient. They are incorrect.

“The law is well settled that in a personal injury action causation must be *proven within a reasonable medical probability based upon competent expert testimony*. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical “probability” and a medical “possibility” needs little discussion. There can be many possible “causes,” indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes “probable” when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.’ [Citation.]” (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384–1385.)

Accordingly, “[i]t is undisputed that qualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common expertise that the expert’s opinion will assist the trier of fact to assess the issue of causation.” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (*Jennings*); see also Evid. Code, § 801, subd. (a).) But an expert may not express an opinion—even one within his or her area of expertise—that lacks foundational support. An expert opinion that is based on an assumption of fact without evidentiary support, or that is based on speculation or

conjecture, has no evidentiary value and may be excluded. (*Jennings, supra*, at p. 1117.) “The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed.” (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135; see also *Jennings, supra*, at p. 1117.)

In *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402, the Court of Appeal affirmed a grant of nonsuit in favor of the defendant where experts could opine only that the defendant’s drug was a possible rather than a probable cause of the plaintiff’s cancer. The same result is compelled here, as the nonsuited appellants failed to offer competent expert testimony showing a causal connection between Legionella exposure and injury.

We summarize the evidence appellants presented to establish causation. Brown tested negative for Legionella exposure and Dr. Pitchon was unable to render any diagnosis. Dr. Batra, who examined Evans, testified that “I really do not have any opinion on contribution of the Legionnaires’ disease to her lung status.” Dr. Batra also examined Hill and testified only that Hill’s medical records suggested her upper respiratory infection may have been caused by Legionella exposure. Prior testing performed on Johnson was inadequate to enable Dr. Batra to render any diagnosis; he testified that “[i]n the absence of other corroborating evidence I’m unable to say that she [Johnson] has significant disease related to Legionnaires’ disease.” Neither Dr. Pitchon nor Dr. Batra examined Parker, Pickett or Polee. Finally, as to Richardson, Dr. Batra testified: “I did not have anything to confirm that she [Richardson] had been exposed to Legionnaires’ disease.”

Because the foregoing appellants failed to proffer expert testimony it was more probable than not that Legionella exposure caused the conditions about which they complained, their evidence was insufficient to go to the jury. (*Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at pp. 402–403.)

II. Defendants' Appeal.

In a limited cross-appeal, defendants contend the evidence was insufficient to support the verdict rendered in favor of Cherry. Though they purport to argue that the amount of damages awarded to Cherry was not supported by substantial evidence, the bulk of their argument is directed to the evidence establishing causation. We conclude there was substantial evidence supporting both the element of causation and the award of damages to Cherry.

A. *Standard of Review.*

“When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment.” (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

“‘The substantial evidence standard of review also applies to the jury’s findings on the issue of causation’ [Citation.]” (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 695.) Likewise, the same standard of review applies to damage awards. We must uphold a jury’s damages award whenever possible and may not set it aside unless, viewed in light of the entire record, it is so lacking in evidentiary support as to render it unreasonable. (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.) “In assessing a claim that the jury’s award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor.” (*Ibid.*)

B. Causation.

As discussed earlier, “causation must be founded upon expert testimony and cannot be inferred from the jury’s consideration of the totality of the circumstances unless those circumstances include the requisite expert testimony on causation.” (*Cottle v. Superior Court*, *supra*, 3 Cal.App.4th at p. 1385.) To illustrate the application of this principle, in *Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1317, a medical expert testified that the defendants’ negligence in monitoring and treating the plaintiff was a substantial factor contributing to her brain damage. But because there was evidence that Lithium ingestion also contributed to the plaintiff’s injury, the trial court granted nonsuit in favor of the defendants. (*Id.* at p. 1312.) The Court of Appeal reversed, reasoning that while the evidence showed multiple causes, each was shown by expert testimony to be a “substantial, contributory and essential” cause of injury. (*Id.* at p. 1317.) As the court explained, given “that defendants’ conduct was a substantial factor in bringing about the outcome, [the expert’s] inability to pin down the exact extent to which defendants’ conduct contributed to the outcome is immaterial for purposes of *causation*. Clearly, where a defendant’s negligence is a concurring cause of an injury, the law regards it as a legal cause of the injury, *regardless of the extent to which it contributes to the injury*.” (*Id.* at pp. 1317–1318.)

Here, the evidence was undisputed that the Building in which Cherry worked contained extremely high levels of *Legionella* in its water system. Appellants’ expert Freije opined generally that Building occupants were exposed to *Legionella* either through the cooling tower or the Building’s potable water system. With respect to Cherry specifically, multiple experts opined to a reasonable medical probability that her *Legionella* exposure and Legionnaires’ disease caused her to suffer injury. Dr. Pitchon testified that Cherry was diagnosed with “full-blown Legionnaires’ disease” when she was hospitalized in April 2000. Dr. Batra later confirmed that diagnosis. He opined that her Legionnaires’ disease had caused her to have Legionnaires’ pneumonia, which in turn weakened and scarred her lungs thereby making her more susceptible to future respiratory infections. Dr. Batra also testified that *Legionella* exposure was a

contributing factor to other health problems Cherry suffered, including the formation of blood clots in her lungs. Similarly, Dr. Pitchon testified that Cherry suffered from ongoing, irreversible lung problems as a result of her Legionnaires' disease. Confirming that Legionella exposure was the cause of Cherry's health problems, Dr. Glowalla testified that Cherry's condition did not result from a genetic disorder.

In asserting there was insufficient evidence of causation, defendants focus on the testimony of their expert who opined that many of Cherry's symptoms preceded her Legionella exposure. When an appellant challenges the sufficiency of the evidence, "[t]he appellant's brief must set forth *all* of the material evidence bearing on the issue, not merely the evidence favorable to appellant, and must show how the evidence does not sustain the challenged finding. [Citations.]" (*Garlock Sealing Technologies LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951.) As noted above, Dr. Pitchon and Dr. Batra testified contrary to defendants' expert that many of Cherry's ailments resulted from Legionella exposure and Legionnaires' disease. Moreover, Dr. Batra took Cherry's preexisting condition into account and testified that her sensitive lungs made her more susceptible to Legionnaires' pneumonia.

Defendants also point to the absence of evidence showing to a reasonable medical probability that Legionella exposure caused Cherry's seizure disorder. Though the trial court determined that any opinion concerning the cause of Cherry's seizure disorder was beyond the area of expertise of Dr. Batra, defendants' argument ignores the balance of Dr. Batra's and Dr. Pitchon's testimony that Legionella exposure caused Cherry to suffer significant and permanent lung damage. Their testimony was unlike that in the sole authority relied on by defendants, *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487, where the court found that an expert's declaration that "he 'feels' that the leak of some unspecified gas is 'probably' the culprit for the increase in the severity of [the plaintiff's] respiratory problems" was insufficient to raise a triable issue of fact precluding summary judgment. Here, expert testimony provided substantial evidence of causation to support the jury's findings of negligence as to Cherry.

C. Damages.

Defendants also contend that there was insufficient evidence to support the over \$1.3 million the jury awarded to Cherry. The jury's award was comprised of \$631,771.80 in economic damages and \$750,000 in noneconomic damages. Substantial evidence supported both aspects of the award.

A person injured by another's tortious conduct "is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640.) Likewise, "a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury" [Citation.]'" (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153.) With respect to future medical care, Dr. Batra testified that Cherry's basic monitoring examinations necessitated by the damage to her lungs would cost approximately \$3,000 to \$4,000 annually; he also opined that Cherry would need additional lifetime follow-up for her lung clots and other conditions. Forensic economist Robert Johnson testified that the present value of Cherry's future medical expenses was \$197,302. Taking into account Cherry's life expectancy and her earning capacity before and after her injuries, Johnson further testified that the present value of Cherry's lost earning capacity was \$1,291,096.

Substantial evidence supported the jury's award of approximately \$632,000 in economic damages. As noted in *Abbott v. Tax Express* (1998) 67 Cal.App.4th 853, 857, the jury is not bound by the values provided by expert testimony and may award a lesser amount than shown by that testimony. (See *Randles v. Lowry* (1970) 4 Cal.App.3d 68, 73 [substantial evidence supported jury's award for medical expenses, even though the jury may have excluded certain expenses].) Here, the jury's economic damages award was approximately one-half of the amount shown by Cherry's experts. We see no basis to disturb the jury's consideration of the evidence.

Substantial evidence likewise supported the jury's \$750,000 noneconomic damages award. In *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, the

appellate court explained: “Plaintiff is entitled to recover damages for physical pain and for mental suffering from her physical injury. These injuries constitute the principal elements of tort personal injury damage. An award failing to compensate an injured plaintiff where pain and suffering was present is inadequate as a matter of law.

[Citation.] Pain and suffering are detriment factors for which an injured plaintiff must be compensated if these detriment factors are caused by defendant’s tort. [Citation.] The absence of medical bills or medical testimony will not foreclose a recovery for pain and suffering. [Citation.] ‘Moreover, even in the absence of any explicit evidence showing pain, the jury may infer . . . pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain.’ [Citation.] [Citation.]” (*Id.* at p. 13; see also *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 767 [“A plaintiff’s loss of enjoyment of life is not ‘a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact’”].)

Cherry testified that she stayed in the hospital for several days in April when she was diagnosed with Legionnaires’ disease and resulting pneumonia. She remained at home for approximately two months thereafter. Though she returned to work in June or July 2000, she continued to suffer from multiple symptoms that began when she started working in the Building, including chills, fever, shortness of breath, chest pain, dizziness and fatigue. Cherry further testified that she continued to suffer from those symptoms at the time of trial. In addition, she had curtailed many of her previous activities because of her symptoms, including exercising and housecleaning, and was often tired. Cherry’s fiancé also testified about the negative changes he observed after Cherry began working in the Building, including her increasing fatigue, shortness of breath and inability to perform basic housekeeping tasks.

A plaintiff’s own testimony commonly establishes the basis for noneconomic damages. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 895.) Moreover, lay witnesses may relay their observations of the plaintiff’s pain and suffering. (*Ibid.*) In short, the testimony offered by Cherry and her fiancé provided a sufficient basis for the jury’s noneconomic damages award.

DISPOSITION

The judgments are affirmed. Parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ